Petition

81-1838

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ALEXANDER L. STEVAS
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HUGHES TOOL COMPANY,
Petitioner,

v.

WILLIE D. RICHARDS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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I

QUESTIONS PRESENTED

1. Whether, under applicable principles of federal labor law the resolution of a grievance reached short of arbitration but pursuant to a valid collective bargaining grievance procedure bars a subsequent state court suit brought pursuant to a state wrongful discharge statute concerning the same issues which were the subject of the collective bargaining grievance procedure?

2. Whether sections 203(d) and 301(a) of the Labor Management Relations Act preempt Tex. Rev. Civ. Stat. Ann., art. 8307c as to employees who are subject to a valid collective bargaining agreement between an employer and a union who has been certified by the National Labor Relations Board as the exclusive collective bargaining representative of such employees?

II

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Plaintiff, Willie D. Richards, who is the Respondent herein, and Defendant, Hughes Tool Company, who is the Petitioner herein.

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No. _____

In The

Supreme Court of the United States

October Term, 1981

Hughes Tool Company,

Petitioner,

v.

Willie D. Richards,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioner Hughes Tool Company respectfully prays that a writ of certiorari issue to review the judgment, opinion and related rulings of the Supreme Court of Texas.

OPINIONS BELOW

1. The opinion of the Texas Supreme Court is reported at 615 S.W.2d 196 (1981) and is annexed hereto as Appendix A.

2. The opinions of the Court of Civil Appeals, now known as the Court of Appeals, 14th Supreme Judicial District of Houston, Texas are reported at 610 S.W.2d 232

(1980) and 624 S.W.2d 598 (1981) and are annexed hereto as Appendix B and Appendix C, respectively.

3. The judgment of the District Court of Harris County, Texas, 11th Judicial District, entered on October 17, 1979, is not reported and is annexed hereto as Appendix D.

STATEMENT OF JURISDICTION

1. The judgment sought to be reviewed is that of the Supreme Court of Texas, which was entered on April 29, 1981, a copy of which is annexed to this petition as Appendix E. That judgment reversed the judgment of the Court of Appeals which had rendered judgment in favor of Petitioner (See Appendix F.), and remanded this cause back to the Court of Appeals for further proceedings consistent with the opinion of the Texas Supreme Court. (See Appendix A.) Petitioner filed a timely motion for rehearing in the Supreme Court of Texas which was overruled on June 3, 1981. (See Appendix G.)

2. Thereafter, on July 15, 1981 the Court of Appeals entered a second judgment reversing the original judgment of the District Court in favor of Respondent and remanding this cause back to the District Court for a new trial. (See Appendix H.) A timely motion for rehearing was filed in the Court of Appeals which was denied on September 17, 1981. (See Appendix I.)

3. Petitioner sought further review of this judgment of the Court of Appeals and of the prior judgment of the Supreme Court of Texas by timely filing Application for Writ of Error in the Supreme Court of Texas, which application was denied on December 9, 1981. (See Appendix J.) Petitioner's timely motion for rehearing was overruled on January 6, 1982. (See Appendix K.) This petition for certiorari was filed within 90 days of that date.

4. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 and Rule 17 of the Rules of this Court.

STATUTORY PROVISIONS INVOLVED

1. Section 203(d) of the Labor Management Relations Act provides as follows:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The service is directed to make its conciliation and mediation services available in the settlement of such disputes only as a last resort and in exceptional cases.

2. Section 301(a) of the Labor Management Relations Act provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

3. Texas Revised Civil Statutes Annotated, article 8307c provides as follows:

> Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.
>
> Sec. 2. A person who violates any provision of section 1 of this Act shall be liable for reasonable damages

suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be on the employee.

Sec. 3. The district courts of the State of Texas shall have jurisdiction, for cause shown, to restrain violations of this Act.

STATEMENT OF THE CASE

For the purposes of the questions presented by this petition, this case involves no disputed issues of fact. Instead, review by this Court is sought solely on questions of federal labor law and policy that were presented and urged by Petitioner Hughes Tool Company ("Hughes") to the courts below.

This action was brought by Respondent Willie D. Richards ("Richards") pursuant to art. 8307c of the Texas Workmen's Compensation Act, Tex. Rev. Civ. Stat. Ann. art. 8307c (Supp. 1982) claiming that he had been discharged by Hughes in retaliation for filing a claim or otherwise instituting proceedings to claim workers' compensation benefits.[1] Subsequent to the incident and related events giving rise to the discharge made the basis of this lawsuit,[2] Richards filed a grievance through his union, the

[1] Although art. 8307c was enacted in 1971 by the Texas Legislature as part of the Texas Workmen's Compensation Act, Acts 1971, 62nd Leg., p. 884, ch. 115, this state created right of action is wholly unrelated to the employee's underlying worker's compensation claim, if any, arising out of a job-related injury. Therefore, the questions presented by this petition do not seek to contest the validity of a state workers' compensation scheme, or state court interpretations thereof, an area which, of course, has traditionally been left to the states.

[2] Although Hughes' and Richards' version of the events giving rise to and the reasons for Richards' discharge were hotly disputed at the trial of the instant case, for the limited purpose of giving consideration to this petition the Court may presume that Richards' version established the requisite casual link between his

United Steelworkers of America, Local 1742 ("Union"),[3] contending that Hughes' conduct with respect to his discharge was in violation of the collective bargaining agreement ("Contract") then in effect between Hughes and Richards' Union.

With regard to disciplinary actions, including discharges, the Contract contained a typical collective bargaining grievance procedure, consisting of four steps through which the employee-grievant could contest management action, culminating in final and binding arbitration of the grievance. The Contract additionally prohibited the discharge of an employee without "just cause" and contained a provision imposing upon Hughes a broad obligation against unjust and discriminatory treatment, including discharges, of bargaining unit employees.

Pursuant to the Contract, Richards' grievance was processed through the grievance procedure, resulting in a determination adverse to Richards reached short of arbitration. No further action, including appeal of this adverse determination to the next level of the grievance procedure and up to and including arbitration, was thereafter taken by either Richards or the Union, his duly certified and exclusive bargaining representative. Approximately one year after the adverse grievance determination the instant lawsuit followed.

In the trial court Hughes maintained, *inter alia,* in its First Amended Answer, Motion for Summary Judg-

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discharge and his claim for worker's compensation benefits. *See Hughes Tool Co.* v. *Richards,* 624 S.W.2d 598 (Tex. App. Houston [14th Dist.] 1981, writ ref'd n.r.e.).

[3] At all times relevant to this action United Steelworkers of America, Local 1742 A.F.L.-C.I.O. was the exclusive representative of all Hughes bargaining unit employees, including Richards, as certified by the National Labor Relations Board in Case No. 23-RC-2011, dated August 12, 1964.

ment, Motion for Instructed Verdict and Motion for Judgment Non Obstante Veredicto and to Disregard Answers to Certain Special Issues that (1) Richards' cause of action under art. 8307c was barred as a result of the adverse determination he had received concerning his grievance, involving the same ultimate issues, and (2) art. 8307c was preempted by federal labor law and policy as set forth in §§ 203(d) and 301(a) of the Labor Management Relations Act ("LMRA"), and the judicial decisions rendered thereunder. These arguments were rejected by the trial court and judgment on the jury's verdict was ultimately entered in favor of Richards. At no time during any of the proceedings below did Richards claim either that the Union had breached the duty of fair representation it owed to Richards under §§ 8(b)(1) and (2) of the National Labor Relations Act in the course of handling his grievance, or that any other improprieties had occurred concerning the handling and ultimate disposition of his grievance.

Hughes appealed to the 14th Court of Appeals in Houston, Texas. In the appeal Hughes again presented the issues previously rejected by the trial court. The appellate court, in reversing the judgment of the trial court and rendering judgement in favor of Hughes held that, absent evidence that the Union had breached its duty of fair representation during the course of its handling of Richard's grievance, the adverse grievance determination operated to bar his subsequent suit under art. 8307c. This decision was based on the 14th Court of Appeals' prior holding in *Thompson* v. *Monsanto Co.*, 559 S.W.2d 873 (Tex. App.-Houston [14th Dist.] 1977, no writ) and on the then recent holding of the Court of Appeals in Beaumont, Texas in *Spainhouer* v. *Western Elec. Co., Inc.*, 592 S.W.2d (Tex. App.-Beaumont 1979), which was later reversed by the Texas Supreme Court. *Spainhouer* v. *Western Elec. Co.*,

Inc., 615 S.W.2d 190 (Tex. 1981). The appellate court never ruled upon Hughes' federal preemption argument.

Richards sought Application for Writ of Error in the Texas Supreme Court. In its Answer of Respondent to Application for Writ of Error Hughes asserted the correctness of the Court of Appeals holding and additionally continued to press its contention that art. 8307c is preempted by §§ 203(d) and 301(a) of the LMRA. The Texas Supreme Court granted Richards' Application for Writ of Error, reversed the judgment of the Court of Appeals and remanded the case back to the appellate court for consideration of Hughes' other points of error. In reversing the judgment of the appellate court the Texas Supreme Court implicitly approved the appellate court's prior holding in *Thompson* v. *Monsanto Co., supra,* but, apparently finding the instant case distinguishable, held that absent final and binding arbitration of the grievance an employee was not barred from additionally contesting his discharge under art. 8307c. Although the issue was presented by Hughes, the Texas Supreme Court did not rule on Hughes' federal preemption point of error. Hughes sought review of the Texas Supreme Court's judgment, but such review was denied (Respondent's Motion for Rehearing).

The 14th Court of Appeals, on remand from the Texas Supreme Court, and again without ruling on the federal preemption question, reversed the judgment of the trial court and remanded this cause for a new trial on the merits. Hughes sought rehearing of this judgment of the Court of Appeals; however, its motion was denied (Motion for Rehearing of Appellant Hughes Tool Company).

Hughes subsequently appealed this judgment to the Texas Supreme Court, again raising these issues of the federal preemption of art. 8307c in its Application for Writ of Error and Motion for Rehearing. However, once again

the Texas Supreme Court declined to address these issues. Thus, although Richards has never throughout the entire course of this case articulated any complaint with the handling of the grievance concerning his discharge, this cause is presently being remanded to the District Court of Harris County, Texas, 11th Judicial District, for trial on the merits. Richards now stands to get yet another "bite at the apple."

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

I

The decisions below conflict with prior decisions of this Court concerning the application of federal law and the effect a valid collective bargaining grievance procedure determination has upon a subsequent state court action concerning the same issues.

Section 203(d) of the LMRA, 29 U.S.C. § 173(d)(1978) provides that "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." In recognition of this long established Congressional policy prior decisions of the Texas courts have consistently held that federal substantive law governs the disposition of state causes of action arising out of matters covered by an applicable collective bargaining agreement; *see e.g. Duckstein* v. *General Dynamic Corp., Fort Worth Div.* 499 S.W.2d 907 (Tex. Civ. App.-Fort Worth 1973), *cert, denied,* 419 U.S. 835 (1974); *McBride* v. *Beaumont City Lines, Inc.,* 356 S.W.2d 395 (Tex. Civ. App.-Beaumont 1962, write dism'd); *Chapel* v. *Southwestern Bell Telephone Company,* 520 S.W.2d 592 (Tex. Civ. App.-Fort Worth 1975, no writ); *Mills* v. *Braniff Airways, Inc.,* 527 S.W.2d 838 (Tex. Civ. App.-Eastland 1975, no writ); *Lindsey* v.

General Dynamics Corporation, 450 S.W.2d 895 (Tex. Civ. App.-Waco 1970, no writ), including state court causes of action alleging wrongful discharge. *Duckstein* v. *General Dynamics Corp., Fort Worth Div., supra; Buchanan* v. *St. Louis Southwestern Railway Co.,* 400 S.W.2d 362 (Tex. Civ. App. Dallas 1966, writ ref'd n.r.e.).

More particularly, Texas courts have held that where applicable, *i.e.* where there exists a valid collective bargaining agreement containing an agreed upon method for adjusting disputes and grievances, federal law likewise governs the state court's adjudication of a cause of action brought pursuant to Tex. Rev. Civ. Stat. Ann., art. 8307c. *Thompson* v. *Monsanto Company,* 559 S.W.2d 873 (Tex. Civ. App. - Houston [14th Dist.] 1977, no writ). Hence, in *Thompson* the court held that an adverse arbitration decision concerning an employee's discharge precluded a subsequent wrongful discharge action brought pursuant to art. 8307c. In reaching this conclusion the Court not only recognized the preeminence and therefore, applicability of federal law, but also noted that art. 8307c did not constitute the type of alternative or supplemental remedies to the grievance and arbitration process such as were recognized by this Court in *U.S. Bulk Carriers, Inc.* v. *Arguelles,* 400 U.S. 351 (1971); *Alexander* v. *Gardener-Denver Company,* 415 U.S. 36 (1974); *Carey* v. *Westinghouse Electric Corporation* 375 U.S. 261 (1964); *McKinney* v. *Missouri-Kansas-Texas R. Co.,* 357 U.S. 265 (1958); and *Barrentine* v. *Arkansas-Best Freight System,* 450 U.S. 728 (1981).[4] In short, consistent with the rule enunciated by this Court in

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[4] Although the appellate court's opinion in *Thompson* preceded this Court's decision in *Barrentine,* the court's opinion nevertheless recognized the optional remedy extended to suits brought to enforce rights provided to employees under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* *See* 559 S.W.2d 873 at 875.

Vaca v. *Sipes*, 386 U.S. 171 (1967) the appellate court in *Thompson* and in its original opinion in the instant case, *Hughes Tool Co.* v. *Richards*, 610 S.W.2d 232 (Tex. Civ. App. - Houston [14th Dist.] 1980) (See Appendix B.), held that absent pleadings and proof sufficient to support a finding that an employee's union has breached its duty of fair representation, an unappealed adverse grievance determination reached pursuant to a valid collective bargaining grievance procedure will bar the employee's subsequent wrongful discharge suit brought pursuant to art. 8307c.

Notwithstanding its approval of the result reached by the court of appeals in *Thompson* the Texas Supreme Court in reversing the initial judgment of the appellate court in the instant case, concluded that an unappealed, adverse grievance determination will not operate to bar an employee's subsequent cause of action under art. 8307c involving the same issues which were determined in the grievance. Stated another way, in the instant case the Texas Supreme Court held that actual arbitration of the discharge grievance is the *only* circumstance under which the employee-grievant's art. 8307c suit will be barred.[5]

If allowed to stand, the effects of the Texas Supreme Court's decision are clear. First, employees subject to a collective bargaining agreement containing a valid grievance procedure will have an incentive to avoid arbitration.

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[5] Immediately prior to its initial decision in the case at bar the Texas Supreme Court, in *Spainhouer* v. *Western Elec. Co., Inc.*, 615 S.W.2d 190 (Tex. 1981), also held that absent actual arbitration of the discharge grievance, an employee may pursue a cause of action under art. 8307c. The Texas Supreme Court's *Spainhouer* decision was based upon its earlier opinion in *Carnation Co.* v. *Borner*, 610 S.W.2d 450 (Tex. 1980). In *Spainhouer*, the court of appeals' opinion to the contrary was expressly based on this Court's decision in *Vaca* v. *Sipes, supra*. *See Spainhouer* v. *Western Elec. Co., Inc.*, 592 S.W.2d 662 (Tex. Civ. App.-Beaumont, 1979).

This conflicts with the federal policy to resolve finally all grievable disputes through the procedure established by the collective bargaining agreement. Second, a decision reached through the grievance mechanism can be overturned without any reference to the adequacy of the collective bargaining agent's representation of the grievant. This undermines an employer's effort to resolve disputes with unions serving as the employee's exclusive representative. The employee, having designated the union as his exclusive representative may now substitute his judgment for that of the union regarding the validity of the result reached under the grievance mechanism.

Hughes respectfully submits that the Texas Supreme Court's decision draws an artificial and erroneous distinction between those greviances which are resolved through arbitration and those which are resolved short of arbitration. Certainly, such a distinction is plainly inconsistent with federal labor policy, and clearly, it is contrary to and not sanctioned by prior decisions of this Court. *Vaca* v. *Sipes, supra; Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). *See also United Parcel Serv., Inc.* v. *Mitchell*, — U.S. —, 101 S.Ct. 1559 (1981). Thus, the Texas Supreme Court failed to apply well settled and controlling principles of federal law. Hughes would submit that the issue presented herein raises a substantial question concerning the extent that a state may interfere with an established, federal legislative scheme, thereby compelling review of the judgment and related rulings below.

II

The decisions below conflict with prior decisions of this Court and with other decisions of state courts of last resort concerning an employee's obligation to exhaust collective bargaining grievance procedure remedies and the employee's burden of establishing a breach of his union's duty of fair representation prior to successfully maintaining an action in court involving the same issues which were within the scope of a collective bargaining agreement; and, these significant and recurring issues have not been, but should be settled by this Court.

In the case at bar the Contract between Hughes and the Union contained express prohibitions against discharges without "just cause" and discriminatory treatment of bargaining unit employees. In light of these express contractual provisions it is axiomatic that the discharge of an employee for the exercise of a legal right, i.e. filing a claim or otherwise instituting proceedings to collect worker's compensation benefits, would be a discharge without "just cause" and a discriminatory act, thereby constituting a breach of the Contract. Accordingly, Hughes submits that since Richards' alleged art. 8307c claim was subject to resolution through the collective bargaining grievance procedure, subsequent judicial review of such claim is properly within the purview of § 301(a) of the LMRA, and should therefore be determined in accordance with federal law.

Hughes does not contend that the courts of the State of Texas are without jurisdiction to adjudicate claims arising out of alleged violations of a collective bargaining agreement for the question of whether the state courts possess concurrent jurisdiction over such claims has long since been resolved. *Charles Dowd Box Co.* v. *Courtney,* 368 U.S. 502 (1962). However, it is equally well settled that in determining such claims the lesson derived from this Court's decis-

ion in *Textile Workers Union* v. *Lincoln Mills of Ala.* 353 U.S. 448 (1957) requires that state courts decide the "issues raised in suits of a kind covered by § 301 [LMRA] . . . according to the precepts of federal labor policy." *Local 174, Teamsters, etc.* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

One of these established precepts is the rule requiring the plaintiff-employee to exhaust his collective bargaining remedies prior to seeking judicial review of his claim. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). Once the plaintiff-employee has either satisfied this exhaustion requirement or the facts demonstrate that his claim falls within one of the recognized exceptions[6] to the exhaustion requirement, then the plaintiff-employee may, of course, seek judicial review of and recovery on his claim; *provided* however, that he pleads, proves and obtains a finding that his union as bargaining agent breached its duty of fair representation in its handling of the underlying grievance. *Vaca* v. *Sipes, supra* at 186; *United Parcel Serv. Inc.* v. *Mitchell*, 101 S.Ct. at 1563-4.

Although recognizing that a question may exist concerning the application of federal substantive law in suits arising under art. 8307c when brought under factual circumstances similar to those present in the case at bar,[7] the

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[6] *Vaca* v. *Sipes, supra* at 185-6; *Glover* v. *St. Louis Southwestern Railway Co.*, 393 U.S. 324 (1969). Significantly, in the instant case Richards has never complained that (1) Hughes' conduct with respect to his discharge amounted to a repudiation of the grievance procedures contained in the Contract, (2) he was prevented from appealing his grievance determination to a higher level as a result of the union's wrongful refusal to process his grievance or (3) any effort to exhaust his remedies under the Contract would have been "wholly futile." *Id.* at 330.

[7] In *Spainhouer* v. *Western Elec. Co., Inc.*, 615 S.W.2d 190 (Tex. 1981), decided two weeks prior to its initial decision in the instant case, the Texas Supreme Court declined to rule on the question

courts below, including the Texas Supreme Court, have thus far sought to avoid addressing themselves to this question. Indeed, the Texas Supreme Court's initial decision in this cause when taken together with its subsequent refusals to address this federal question can only be construed as a repudiation of the controlling federal principles.

This federal question which the courts below have sought to avoid is not unique to the State of Texas, but is a substantial and recurring one that has been the subject of decisions in other jurisdictions with conflicting results. For example, an appellate court in Illinois has ruled that an employee's common law claim for retaliatory discharge arising out of the pursuit of workers' compensation benefits is properly the subject of the collective bargaining grievance procedure and the applicable federal labor law principles concerning the handling, disposition of and judicial challenges to the results obtained in such grievances. *Cook* v. *Caterpillar Tractor Co.*, 407 N.E.2d 95 (Ill. App.), *leave to appeal den.* 81 Ill.2d 601 (1980). Hence, in *Cook* the court affirmed the dismissal of the employee's suit on the ground that the employee's claim had already been the subject of an adverse grievance determination concerning the employee's discharge. Similarly, the Minnesota Supreme Court affirmed the dismissal of an employee's retaliatory discharge action brought pursuant to the Minnesota Occupational Health & Safety Act partially on the grounds that the employee's discharge was properly the subject of the grievance procedure contained in the collective bargaining agree-

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of whether § 301 required the application of federal substantive law in suits brought under art. 8307c for reason that the issue was not properly before the court. *Id.* at 191. Despite Hughes' repeated attempts to obtain a ruling on this issue the Texas Supreme Court and the court of appeals have likewise steadfastly refused to address this issue.

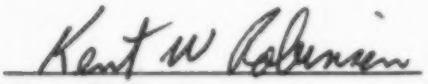
ment between the employee's union and his employer, holding that under controlling principles of federal labor law the employee's failure to avail himself of his collective bargaining remedies precluded his subsequent state court action. *Davis* v. *Boise Cascade Corp.*, 288 N.W.2d 680 (Minn. 1979). On the other hand, the Supreme Court of Oregon, has rejected the argument that claims arising under a retaliatory discharge statute similar to art. 8307c are governed by federal law as to employees subject to the terms and conditions of a collective bargaining agreement, and the grievance procedure contained therein. *Vaughn* v. *Pacific Northwest Bell Tel. Co.*, 611 P.2d 281 (Or. 1980).

Hughes respectfully submits that the instant case presents compelling reasons for review by this Court. The continued refusal of the Texas Supreme Court to review this question concerning the proper scope of a state legislative enactment which runs head long into the pervasive federal statutory scheme embodied in the LMRA at best undermines the chosen method of dispute resolution, and at worst is an invitation to increased industrial strife. Under existing Texas law employees can now circumvent with impunity established collective bargaining grievance procedures, the same procedures which were negotiated for their mutual protection and benefit. Clearly such a result is not contemplated under § 301 which was enacted with the intention that "doctrines of federal labor law uniformly . . . prevail over inconsistent local rules." *Local 174, Teamsters, Etc.* v. *Lucas Flour Co., supra,* at 104. In this regard Hughes would urge that art. 8307c is plainly that type of inconsistent local rule over which established principles of federal labor law should prevail.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment, opinion and related rulings of the Supreme Court of Texas.

Respectfully submitted,



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Appendix

APPENDIX A

IN THE

Supreme Court of Texas

No. C-150

FROM HARRIS COUNTY
FOURTEENTH DISTRICT

WILLIE D. RICHARDS,

Petitioner,

v.

HUGHES TOOL COMPANY,

Respondent.

PER CURIAM

This case involves an alleged wrongful discharge under Texas Revised Civil Statutes Annotated article 8307c. Richards was fired by Hughes Tool Company in 1975 shortly after he was hurt on the job. Trial was to a jury which found that Richards was discharged for instituting proceedings to claim workers compensation benefits. The trial court entered judgment on the verdict. The court of civil appeals reversed the judgment of the trial court and rendered judgment for Hughes Tool Company. That court reasoned that a final settlement of Richards' union grievance precluded this lawsuit. 610 S.W.2d 232. We reverse the judgment of the court of civil appeals and remand the cause to that court.

Richards was hurt on July 7, 1975. On July 8, 1975, following a disturbance, he was suspended. The United Steelworkers of America's contract with Hughes Tool Company provides that a worker must be suspended initially for not more than five working days prior to being discharged.

Richards was discharged on July 14, 1975. The contract provides for a grievance meeting prior to the discharge, and that the complaint was then to be handled as any other grievance. Various steps are set out in the grievance procedure, culminating with arbitration.

Only the first step was followed in Richards' case. The Union then requested, and obtained, a review outside of the established grievance procedure. That meeting was adjourned without a final determination. Prior determinations were against Richards. No further action was taken by the Union or Richards until this lawsuit was filed by Richards.

In *Carnation Co.* v. *Borner,* 610 S.W.2d 450 (Tex. 1980), there was a jury finding that no settlement was reached on the grievance filed by Borner's union. A grievance had been filed by Borner, but it was never acted upon by his union. In *Spainhouer* v. *Western Electric Co.,* 24 Tex. S. Ct. J. 336 (substituted opinion of April 15, 1981), the grievance was carried through all steps except binding arbitration. In both cases we distinguished *Thompson* v. *Monsanto Company,* 559 S.W.2d 873 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ). In *Monsanto,* the union grievance proceeding had been carried through arbitration, and Thompson had an adverse and binding decision. The court in *Monsanto* held arbitration precluded a subsequent lawsuit on the same claim of wrongful discharge. The court of civil appeals in this case followed *Monsanto.* It held that there had been a final settlement or determination under the union grievance proceedings as set out in the union contract. This holding is contrary to *Spainhouer.*

The application for writ of error is granted, and, without hearing oral argument, we reverse the judgment of the

court of civil appeals. Rule 483, Texas Rules of Civil Procedure. The court of civil appeals did not consider Hughes Tool Company's other points of error. They included several factual sufficiency points over which this Court has no jurisdiction. Accordingly, we remand the cause to the court of civil appeals for proceedings consistent with this opinion.

OPINION DELIVERED: April 29, 1981

APPENDIX B

Reversed and rendered, and Opinion
filed December 24, 1980.

No. B2373

HUGHES TOOL COMPANY

Appellant,

v.

WILLIE D. RICHARDS

Appellee.

APPEAL FROM THE 11TH DISTRICT COURT
OF HARRIS COUNTY

PER CURIAM

This is a suit under TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1978) brought by Willie D. Richards, appellee (Richards) against his former employer, Hughes Tool Company, appellant (Hughes). Richards alleges he was discharged for making a worker's compensation claim while in Hughes' employ and on this basis Richards alleges art. 8307c was violated. Trial below was to a jury, and in response to 5 special issues the jury found in Richards' favor, awarding $15,000.00 in past and future loss of earnings and $15,000.00 in exemplary damages. We reverse and render judgment for Hughes.

Richards was hired by Hughes in 1965 and at the time of his discharge in 1975 we was working in the Special Products section at Hughes. On July 7, 1975, Richards, while at work, allegedly sustained an injury to his shoulder. After reporting the injury to a supervisor, Jack Wooten, Richards

went to Hughes' Medical and Safety Services and was examined by Dr. Hines, the company doctor. After the examination Richards was released for "light duty" the remainder of the day.

The following day Richards returned to the clinic and allegedly used profanity in front of a nurse and several persons waiting to receive their pre-employment physicals. In addition, after he was directed to Mr. C. L. Day, a Medical and Safety supervisor, Richards continued to use profane and abusive language and allegedly lifted a chair as if to hit Day.

Immediately after this incident a discussion was held, between Richards' supervisors, Day, a Union grievance man and the head of Medical and Safety Services, Mr. J. W. O'Neal. At the conclusion of this discussion, Richards was suspended pending an investigation and hearing.

On July 14, 1975, a hearing was conducted concerning Richards' conduct. At the hearing Richards was represented by three Union representatives. The hearing culminated with Richards' suspension being converted to a discharge. After the conclusion of the initial hearing, Richards and the Union filed a grievance protesting his discharge. A formal hearing on the grievance was held with Richards and his Union representation in attendance. The hearing concluded with a determination that Richards' discharge was for "just cause" and should be upheld.

Thereafter, the Union requested Mr. J. D. Belton, a production manager, to review the matter. Belton agreed to hold a special, informal hearing. At this hearing Richards interrupted and made outbursts which disrupted the meeting and by mutual consent the meeting was adjourned, with Richards' discharge being upheld. No other action pursuant to the grievance procedure was taken by either Richards or the Union. This lawsuit followed.

Trial below resulted in a verdict in Richards' favor. Hughes appeals, alleging 13 points of error.

Points of error 2 and 4 asserted by Hughes are dispositive of the appeal. In these points of error Hughes asserts that the trial court erred in failing to grant their motion for instructed verdict and motion for judgment N.O.V. for the reason that Richards' claim is barred by the final, adverse determination regarding his discharge reached through the contractual grievance procedure established by Hughes and Richards' Union. We agree.

It has been held that after an adverse *final* arbitration decision in a grievance process, an employee who alleges he was fired for filing a worker's compensation claim, could not then bring suit under art. 8307c. *Thompson* v. *Monsanto Co.*, 559 S.W.2d 873 (Tex. Civ. App. — Houston [14th Dist.] 1977, no writ). This is true unless the employee shows that the union failed to fairly represent him in the grievance process, *Id.* at 875; *Vaca* v. *Sipes*, 386 U.S. 171 (1967), or where discrimination in employment practices is involved. 559 S.W.2d at 876; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

Recently, in *Carnation Co.* v. *Borner*, 24 Tex. Sup. Ct. J. 111 (Dec. 13, 1980), the Supreme Court faced the question of whether an employee could bring suit under 8307c after his union had filed a grievance on his behalf but had not done anything in pursuit of the claim beyond the filing. Affirming the Court of Civil Appeals, the Supreme Court held that suit could properly be brought under 8307c even though a grievance had been filed. The court distinguished *Thompson* from the *Carnation* facts, stating:

> We find that [the Carnation employee's] position is distinguishable. [The Carnation employee] filed a grievance pursuant to the collective bargaining agreement. Once the grievance was filed, its processing was

> under the exclusive control of the Union. No arbitration procedure was invoked by the Union and no final and binding arbitration decision was obtained. No resolution of [the employee's] grievance was ever reached.

24 Tex. Sup. Ct. J. at 113.

In a case with facts surprisingly similar to those that exist in the case at bar it was held that a suit under 8307c was precluded because the matter had been addressed in the grievance procedure. In *Spainhouer* v. *Western Electric Co.*, 592 S.W.2d 662 (Tex. Civ. App. – Beaumont 1979, writ filed) plaintiff was injured in the course of her employment with defendant and claimed worker's compensation benefits. She settled her claim for compensation but when she failed to report for duty as instructed by defendant, she was discharged. Claiming that she was wrongfully discharged by defendant, she followed the grievance procedures contained in the contract between her union and her employer. The union pursued her claim through the first four steps of the grievance procedure but elected not to proceed any further and no arbitration was ever had. The Beaumont Court of Civil Appeals affirmed the granting of a summary judgment in defendant's favor, stating:

> The gravamen of plaintiff's complaint is that she was wrongfully discharged by the defendant employer. There was a comprehensive bargaining agreement providing an exclusive method of settlement of such disputes and plaintiff availed herself of such contractual provisions. For reasons which it did not articulate, The International Union refused to take the grievance to the fifth step . . . . [N]o contention is made that the employee-plaintiff was "prevented from exhausting [her] contractual remedies by the union's *wrongful* refusal to process the grievance." The plaintiff chose the Union to process her grievance through the contractual machinery and is now bound by the acts of its agent.

592 S.W.2d at 663 (citations omitted).

Our facts fall somewhere between those found in *Carnation,* where a grievance was only filed, and *Spainhouer* where the grievance was taken through 4 steps but not to arbitration. In the case at bar the Union proceeded through the first step in the grievance process and also requested an informal review of the initial grievance determination. No further action was taken in the grievance process and the matter was not taken to arbitration, the final step under the contract between the union and Hughes.

In our opinion Richards is precluded from bringing an action under art. 8307c. We hold that one who elects to proceed through a grievance procedure provided in a contract between his union and his employer may not then file suit under 8307c after a "final settlement or determination" has been made following a grievance hearing pursuant to the employment contract. Once the decision has been made to go the contractual grievance route the employee is not entitled to another "bite of the apple" in the courts simply because the matter is not resolved in his favor. The employee must choose, before a final settlement of the grievance, whether he wishes to file suit under art. 8307c or proceed under the employment contract.

The parameters of what, in any given case, qualifies as a "final settlement" of an employee's grievance was not defined in *Carnation* and we do not do so here. This determination must be made only after an examination of the circumstar that exist in any given case. We only hold that unde acts as they exist in the instant case a final settlemen. ıe matter was made. Unlike *Carnation,* we have in this case much more than the mere filing of a grievance which was never resolved under the applicable contract procedure. In the instant case the union representing Richards participated in a preliminary discussion about Richards' conduct, filed a grievance on Richards' behalf and after an adverse determination, sought and was

granted a review of the matter. After Richards discharge was upheld on review, the Union, for whatever reasons, did not elect to pursue the matter further. In our opinion this was a final settlement of the matter and thus the suit under 8307c was improper.

Of course, an exception to the holding above must be made where the union breaches its duty of fair representation. *Thompson* v. *Monsanto Co.*, 559 S.W.2d 873, 875 (Tex. Civ. App. — Houston [14th Dist.] 1977, no writ). This exception is limited to those instances where the Union has acted arbitrarily, discriminatorily or in bad faith. *Id.*, *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Even if the Union in the present case had acted in this manner, we would be precluded from allowing the suit under art. 8307c because Richards did not complain of any alleged wrongful acts of the Union in the court below. In *Thompson* we stated that exception is not applicable where there is no complaint or proof demonstrating a breach of the union's duty of fair representation, and where no issue is submitted to the jury on the matter. In these cases the employee is precluded from contesting his discharge pursuant to art. 8307c and the matter cannot be raised for the first time on appeal. *See* TEX. R. CIV. P. 279. *See also Spainhouer* v. *Western Electric Co.*, 592 S.W.2d 662, 663 (Tex. Civ. App. — Beaumont 1979, writ filed).

Finding that Richards could not avail himself of the trial court's jurisdiction in settling his dispute, the judgment of the court below must be reversed and judgment rendered that Richards take nothing from Hughes.

Judgment reversed and rendered.

PER CURIAM

Judgment rendered, and Opinion filed December 24, 1980.

Panel consists of Associate Justices Coulson, Miller and Pressler.

APPENDIX C

Reversed and remanded, and Opinion filed July 5, 1981.

No. B2373

HUGHES TOOL COMPANY

Appellant,

v.

WILLIE D. RICHARDS

Appellee.

ON REMAND FROM THE SUPREME COURT

This is a suit under TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1978) brought by Willie D. Richards, (Richards) against his former employer, Hughes Tool Company (Hughes). Richards alleges he was discharged for making a worker's compensation claim while in Hughes' employ and on this basis he alleges art. 8307c was violated. Trial was to a jury, and in response to five special issues the jury found in Richards' favor, awarding $15,000.00 in past and future loss of earnings and $15,000.00 in exemplary damages. We reversed and rendered judgment in favor of Hughes. 610 S.W.2d 232. On appeal the Supreme Court, 615 S.W. 2d 196 (Tex. 1981), reversed our judgment and remanded the case back to us for consideration of several of Hughes' factual sufficiency points which we did not previously reach and over which the Supreme Court has no jurisdiction.

We need not detail the facts of the case, as they are set forth in our previous opinion at 610 S.W.2d 232.

Hughes brings several factual sufficiency points, however we will only discuss one, as it is dispositive of the appeal.

In point of error ten Hughes asserts the trial court erred in failing to grant Hughes' motion for new trial for reason that there was insufficient evidence that Richards was discharged for "instituting proceedings" to collect worker's compensation benefits. We agree.

In considering an "insufficient evidence" point we must consider all the evidence and determine whether the jury's answer to an issue should be set aside. *Garza* v. *Alviar,* 395 S.W.2d 821, 823 (Tex. 1965).

The evidence produced at trial almost exclusively involved the incident in Hughes' Medical Department in July of 1975, where Richards allegedly used obscene and abusive language. While this evidence may bear on the issue of whether Hughes was justified in discharging Richards for his conduct at the Medical Department, it does little to show that Hughes fired Richards for instituting proceedings to collect worker's compensation benefits.

There was no evidence of anything said by those involved in Richards' discharge to support he was fired because he instituted proceedings to collect worker's compensation benefits. On the contrary, all involved in the decision indicated Richards was fired because of his conduct in the Medical Services area. Richards himself, when asked what made him feel he was fired because he instituted a claim for worker's compensation benefits, stated that he took this position because Hughes never would accept the fact that he was hurt and because they denied him the right to go and see a doctor. Even were these allegations true, they are insufficient proof, in our view, to support the finding of the jury that Hughes fired Richards because he instituted proceedings to collect worker's compensation benefits.

In our view, the plaintiff in a suit under art. 8307c has the burden of establishing a causal link between the firing and the employee's claim for worker's compensation benefits. Once the link has been established the employer must rebut the alleged discrimination by showing there was a legitimate reason behind the discharge. The evidence adduced in our case simply does not establish this causal link.

In the other Texas cases dealing with the sufficiency of evidence to support recovery under 8307c, it is apparent that where the evidence was found to be sufficient, there was more evidence establishing the causal link than exists in the case at bar.

In *Murray Corporation of Maryland* v. *Brooks,* 600 S.W. 2d 897, 901 (Tex. Civ. App. - Tyler 1980, no writ), there was testimony that the increased insurance premiums because of the employee's worker's compensation claims was a consideration in discharging the employee. In addition, there was testimony that rebutted the employer's stated reasons for firing the employee, as well as evidence that the only employees not called back to work after an alleged recession were the plaintiff and another employee who were the only two employees who filed any substantial worker's compensation claims.

In *Schrader* v. *Artco Bell Corp.,* 579 S.W.2d 5344, 539 (Tex. Civ. App. - Tyler 1979, writ ref'd n.r.e.), the court found there was some evidence to support the jury's findings in a suit based on art. 8307c, based on testimony from the employee that his foreman told him he couldn't work for the company as long as an attorney was representing him. In addition, the employee testified the Executive Vice-President of the employer told him that since the company made a worker's compensation settlement with him, that they couldn't put him back to work.

The evidence in *A. J. Foyt Chevrolet, Inc.* v. *Jacobs,* 578 S.W.2d 445, 447 (Tex. Civ. App. - Houston [1st Dist.] 1979, no writ) revealed that the manager of parts and services told the former employee: "I would put you back to work, but I would be a damned fool to hire you when you have a lawyer." Further, the employee testified the general manager for Foyt stated he was discharged because he would not fire his lawyer. The court found this evidence was sufficient to support the jury's verdict in favor of the employee.

In *E-Tex Dairy Queen, Inc.* v. *Adair,* 566 S.W.2d 37, 40 (Tex. Civ. App. - Beaumont 1978, no writ) there was testimony from the company's general manager and from the district supervisor that one of the reasons for discharging the employee was his filing of a claim for compensation benefits. The court affirmed the judgment in favor of the employee based on this testimony.

Finally, in *Texas Steel Co.* v. *Douglas,* 533 S.W.2d 111, 117 (Tex. Civ. App. - Fort Worth 1976, writ ref'd n.r.e.) the former employee produced evidence which showed the company's superintendent, after learning the employee reported an injury, went out of his way to get the doctor treating him to release him for light duty at a time when the doctor advised that his condition was still such that he couldn't lift anything but the lightest objects and couldn't bend more than one time each hour. The superintendent required the employee to be at work at 6:00 a.m., and when he reported late he was immediately fired. The court found this evidence to be sufficient to raise a fact issue on the question of whether the company fired the employee because he instituted a proceeding for worker's compensation benefits.

Each of the above cited cases relies on evidence that shows some causal link between the firing of the employee and the employee's claim for worker's compensation bene-

fits. From a reading of the entire record we do not feel the evidence in the instant case establishes the causal link and we therefore hold the evidence is insufficient to uphold the finding by the jury that Richards was fired because he instituted a claim for worker's compensation benefits.

Hughes' point of error ten is sustained and the case is reversed and remanded to the trial court for a new trial.

/s/ George E. Miller
Associate Justice

Judgment rendered, and Opinion filed July 15, 1981.

Panel consists of Associate Justices Coulson, Miller and Pressler.

APPENDIX D

FINAL JUDGMENT. ENTERED: Volume 1798, Page 577, General Minutes District Courts, in and for Harris County, Texas.

CAUSE No. 1,089,789

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
11TH JUDICIAL DISTRICT

WILLIE D. RICHARDS
v.
HUGHES TOOL COMPANY

FINAL JUDGMENT

BE IT REMEMBERED that on the 4th day of September, 1979, came on to be heard the above entitled and numbered cause and all parties having appeared in person and/or by and through their duly authorized attorneys of record and both sides having announced ready for trial, a jury of twelve (12) good and true men and women were lawfully selected and duly sworn and the trial of this case proceeded with opening statements for both parties with testimony, admissions, and stipulations of the parties until the 6th day of September, 1979, at which time the Court submitted the case to the Jury upon the Special Issues and Charge of the Court, and after the arguments of counsel, the Jury having retired and deliberated, returned into open Court on the 10th day of September, 1979, their 10 to 2 verdict duly signed by all jurors concerned in said verdict which consisted of various answers to certain Special Issues duly submitted to them by the Court in order to solve them. The Special Issues submitted by the Court in this charge

and the verdict of the Jury thereon all being on file with the Clerk of this Court and to which reference is hereby made for all purposes the same as if set out herein and that same be, and is, hereby expressly incorporated by reference. Such Special Issues and the Answers thereto by the Jury, its Verdict, is set forth as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the plaintiff, WILLIE D. RICHARDS, was discharged on or about July 8, 1975, from his position of employment with Hughes Tool Company for instituting proceedings to claim workman's compensation benefits? Answer "We do" or "We do not", to which the Jury answered: "We do"

SPECIAL ISSUE NO. 2

If you have answered Special Issue No. 1 "We do", and only in that event, then answer Special Issue No. 2:

What sum of money do you find from a preponderance of the evidence would reasonably compensate WILLIE D. RICHARDS for damages, if any, sustained as a result of his wrongful discharge by HUGHES TOOL COMPANY, if you have so found?

Consider the following elements of damage, if any, and none other:

(a) Loss of earnings, if any, in the past, from July 8, 1975, to date of this trial;

(b) Loss of earnings, if any, which in reasonable probability he will sustain in the future beyond the date of this trial.

Answer: $.....; to which the Jury answered: $15,000.00

If you have answered Special Issue No. 1 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that WILLIE D. RICHARDS should be reinstated to his former position of employment with HUGHES TOOL COMPANY? Answer "We do" or "We do not"; to which the Jury answered "We do not".

If you have answered Special Issue No. 1 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that HUGHES TOOL COMPANY acted willfully and maliciously in discharging WILLIE D. RICHARDS on or about July 8, 1975? Answer "We do" or "We do not"; to which the Jury answered "We do".

If you have answered Special Issue No. 4 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 5

What sum of money, if any, do you find from a preponderance of the evidence that the Plaintiff, WILLIE D. RICHARDS, should be awarded against Defendant, HUGHES TOOL COMPANY, as exemplary damages? Answer in dollars and cents, if any; to which the Jury answered "$15,000.00".

DEFENDANT'S MOTION FOR JUDGMENT N.O.V. OVERRULED

And the Plaintiff, Willie D. Richards having duly moved for Judgment on the verdict of the Jury as it appeared by the Answers to the Special Issues submitted to them, and it appearing to the Court from the Pleadings, evidence, stipulations, and admissions, together with the verdict of the Jury and their Answers to the Special Issues submitted to them, that the Plaintiff is entitled to Judgment; it is ordered, adjudged and decreed that Plaintiff do have and recover from the Defendant, HUGHES TOOL COMPANY, the sum of THIRTY THOUSAND AND NO/100 DOLLARS ($30,000.00) by reason of the matters made the basis of this suit, and the Court being of the opinion and now finding from the pleadings, evidence, and verdict of the Jury, Judgment should be rendered herein that the Plaintiff, WILLIE D. RICHARDS, do have and recover, THIRTY THOUSAND AND NO/100 DOLLARS ($30,000.00) from the Defendant, HUGHES TOOL COMPANY, plus the legal rate of interest until paid. It is further

ORDERED that all costs of Court herein are to be taxed against the Defendant, HUGHES TOOL COMPANY, for which let execution issue if this Judgment in total is not timely paid.

SIGNED AND RENDERED at Houston, Harris County, Texas, this the 15th day of November, 1979.

.....
Presiding Judge

Approved as to Form:

.....
GORDON R. COOPER, II
1834 Southmore
Houston, TX 77004
Bar No. 04785000
523-7423
Attorney for Plaintiff

ANDREWS, KURTH, CAMPBELL & JONES

By.....
2500 Exxon Building
Houston, TX 77002
Attorneys for Defendant

APPENDIX E

THE STATE OF TEXAS
TO THE COURT OF CIVIL APPEALS
FOURTEENTH DISTRICT

Before our Supreme Court on the 29th day of April, A.D. 1981, the Cause, upon writ of error, to revise or reverse your judgment between

WILLIE D. RICHARDS

v.

HUGHES TOOL COMPANY

No. C-150

IN THE SUPREME COURT OF TEXAS

No. B-2373

IN THE COURT OF CIVIL APPEALS
FOURTEENTH DISTRICT OF TEXAS,

was determined; and therein our said Supreme Court entered its judgment or order in these words:

"This cause came on to be heard on writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District. The original transcript and the transcript showing the proceedings in the Court of Civil Appeals were duly considered.

"Under the provisions of Rule 483, Texas Rules of Civil Procedure, the application for writ of error is granted and without hearing oral argument in the cause, it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals that reversed the judgment of the trial court and rendered judgment for Hughes Tool Company.

"It is, therefore, *adjudged, ordered* and *decreed* that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and the cause is remanded to that Court for proceedings consistent with the opinion of this Court delivered herein on this day.

"It is further ordered that respondent, Hughes Tool Company, and its surety, St. Paul Fire and Marine Insurance Company, pay all costs expended and incurred in this Court in this case. Petitioner, Willie D. Richards, shall have and recover of and from respondent, Hughes Tool Company, and its surety, St. Paul Fire and Marine Insurance Company, all costs expended and incurred by him in said court. A copy of this judgment with a copy of the opinion shall be certified to the Court of Civil Appeals for the Fourteenth Supreme Judicial District for observance. The original papers and all papers filed in the Fourteenth Court of Civil Appeals shall accompany the mandate of this Court of Civil Appeals."

(PER CURIAM OPINION)

WHEREFORE WE COMMAND YOU to observe the order of our said Supreme Court in this behalf, and in all things to have it duly recognized, obeyed and executed.

WITNESS the Honorable Joe R. Greenhill, Chief Justice of our said Supreme Court, with the seal thereof annexed, at the City of Austin, this the 8th day of June A. D. 1981.

GARSON R. JACKSON
Clerk

By MARY M. WAKEFIELD
Deputy

APPENDIX F

JUDGMENT

No. B2373

HUGHES TOOL COMPANY

v.

WILLIE D. RICHARDS

"This cause, being an appeal from the judgment signed by the court below and entered on October 15, 1979, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that, after Willie D. Richards' discharge was upheld on review the Union, for whatever reasons, did not elect to pursue the matter further and this was a final settlement of the matter and thus the suit under 8307c Texas Revised Civil Statutes Annotated (Supp. 1978) was improper and Willie D. Richards could not avail himself of the trial court's jurisdiction in settling the dispute, it is therefore ordered and adjudged that the judgment of the court below must be reversed and it is here now ordered that judgment be and is rendered that Willie D. Richards take nothing from Hughes Tool Company.

"It is further ordered that the appellee, Willie D. Richards, pay all costs incurred, both in this Court and in the court below. It is further ordered that this decision be certified below for observance."

APPENDIX G

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

June 3, 1981

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of RICHARDS v. HUGHES TOOL CO., No. C-150 was this day overruled.

Very truly yours,

GARSON R. JACKSON,
Clerk

Ms. Marcia A. Graham, Attorney
2500 Exxon Building
Houston, Texas

APPENDIX H

No. B2373

HUGHES TOOL COMPANY
v.
WILLIE D. RICHARDS

JUDGMENT

"This cause, having been reversed and remanded by the Texas Supreme Court on June 10, 1981, came on to be heard again by this Court from the judgment signed by the court below and entered on October 17, 1979, and the same being inspected, because it is the opinion of this Court that there is error in the judgment, it is therefore ordered and adjudged that the judgment of the court below be reversed, and it is further ordered that the cause be remanded to the court below for further proceedings in accordance with this Court's opinion. It is further ordered that the appellant, Hughes Tool Company, and its surety, St. Paul Fire and Marine Insurance Company, pay one-half of all costs incurred by reason of this appeal. It is further ordered that the appellee, Willie D. Richards, pay one-half of all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

APPENDIX I

COURT OF APPEALS
14TH SUPREME JUDICIAL DISTRICT
Civil Courts Building
Houston, Texas 77002

September 17, 1981

Hon. Kent W. Robinson
Hon. Marcia A. Graham
Andrews, Kurth, Campbell & Jones
2500 Exxon Building
Houston, Texas 77002

Hon. Gordon R. Cooper
1834 Southmore
Houston, Texas 77004

Re: B2373 Hughes Tool Company vs. Willie D. Richards, from Harris

Dear Madam and Sirs:

Please be advised that on this date in the above cause the Court OVERRULED appellee's motion for rehearing.

Please be advised that applicant for writ of error, if any, must be submitted on or before Monday, October 19, 1981.

Respectfully,

THELMA MUELLER,
Clerk

TM:cm

APPENDIX J

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

Dec. 9, 1981

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of HUGHES TOOL CO. v. RICHARDS, No. C-814 was this day REFUSED. NO REVERSIBLE ERROR.

Very truly yours,

GARSON R. JACKSON,
Clerk

Mr. Andrew S. Hanen, Attorney
2500 Exxon Building
Houston, Texas 77002

APPENDIX K

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

Jan. 6, 1982

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of NO. C-814: HUHES TOOL COMPANY vs. WILLIE D. RICHARDS was this day OVERRULED.

Very truly yours,

GARSON R. JACKSON,
Clerk

Mr. Kent W. Robinson Atty.
4200 Texas Commerce Tower
Houston, Texas 77002

CERTIFICATE OF SERVICE

I, Kent W. Robinson, Attorney for Hughes Tool Company, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of April, 1982, I served three (3) copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Texas, upon Mr. Gordon R. Cooper, Esq., Attorney of Record in the proceedings below for Willie D. Richards, Respondent herein, by mailing said copies in a duly addressed envelope, with first class postage prepaid to the business address of such Attorney for Respondent, which is 1834 Southmore, Houston, Texas, 77004.

Kent W. Robinson

KENT W. ROBINSON
Attorney for Petitioner
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4182

Opposition

Office - Supreme Court, U.S.
FILED
MAY 4 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HUGHES TOOL COMPANY
Petitioner,

v.

WILLIE D. RICHARDS
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

GORDON R. COOPER, II
Attorney for Respondent
1834 Southmore Blvd.
Houston, Texas 77004
(713) 523-7423

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether, under applicable principles of Federal law, a determination reached pursuant to collective bargaining grievance procedure which is not final, bars a subsequent state Court suit brought pursuant a statute making it unlawful to discharge an employee who has been injured and filed a claim for Worker's Compensation?

2. Whether section 203(d) and 301(a) of the Labor Management Relations Act preempt Tex. Rev. Civ. Stat. Ann., Art. 8307c as to employees who are subject to a valid collective bargaining Agreement between an employer and a union who has been board certified by the National Labor Relations Board as the exclusive bargaining representative of such employees when the decision rendered by said Union is not final?

CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record for Respondent, WILLIE D. RICHARDS, certifies that the following list of persons have an interest in the outcome of this case.

HUGHES TOOL COMPANY,
Petitioner

WILLIE D. RICHARDS,
Respondent.

Respectfully submitted,

GORDON R. COOPER, II
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NO. 81-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HUGHES TOOL COMPANY
Petitioner,

v.

WILLIE D. RICHARDS
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

STATEMENT OF THE CASE

WILLIE D. RICHARDS, Respondent herein brought suit pursuant to Article 8307(c) of the Texas Worker's Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8307(c) (Supp. 1978), alleging that HUGHES TOOL COMPANY, Petitioner, unlawfully discharged him on July 8, 1975, after he instituted proceedings to collect Worker's Compensation benefits.

Richards was hurt on July 7, 1975, and immediately reported his injury to his immediate Supervisor as the first

step in instituting proceedings to collect his Worker's Compensation benefits. Following a disturbance on July 8, 1975 he was suspended. Pursuant to the Union contract, a grievance meeting was held on July 14, 1975 whereupon a decision adverse to Richards was reached. The contract provided for a grievance meeting prior to a discharge, and that the complaint was then to be handled as any other grievance. Various steps are set out in the grievance procedure with the final step being arbitration.

Only the first step was followed in Richards' case—this being the grievance meeting. The Union then requested and obtained a review outside of the established grievance procedure. This meeting adjourned without a final determination. No further action was taken by the Union and Richards then filed his lawsuit alleging that his discharge was in violation of Art. 8307(c) and alleging that the Union failed to represent him in the proceedings.

Richards proceeded to a trial on the merits whereupon the trial Court denied Hughes' Motion for Instructed Verdict and Motion for Judgment Non Obstante Veredicto and the Jury found that Richards had been discharged in violation of Article 8307(c); that Hughes' act in discharging Richards was both willful and malicious and further that Hughes' actions justified an award of FIFTEEN THOUSAND AND NO/100 DOLLARS ($15,000.00) actual damages and FIFTEEN THOUSAND DOLLARS AND NO/100 ($15,000.00) exemplary damages.

Subsequent to the verdict, HUGHES filed an appeal with the Court of Civil Appeals alleging that Richards' claim for damages pursuant to Art. 8307(c) was pre-

empted by Federal Law as embodied in §§ 7 and 8 of the National Labor Relations Act (NLRA); that Richards' claim was barred by the adverse determination regarding his discharge reached through the United Steelworkers of America, Local 1742, Richards' exclusive bargaining agent; that Richards' had not instituted proceedings to collect Worker's Compensation benefits prior to his discharge and that there was no evidence that Hughes' acted willfully and maliciously in discharging Richards.

The Court of Civil Appeals reversed the decision of the trial Court whereupon it ruled that Richards' did not elect to pursue further the decision reached by his Union and this was a final settlement of the matter and thus suit under 8307(c) Texas Revised Civil Statutes Annotated (Supp. 1978) was improper and Richards' could not avail himself of the trial Court's jurisdiction in settling his dispute.

Richards sought application for Writ of Error in the Texas Supreme Court. Hughes responded asserting the ruling of the Court of Civil Appeals was correct. The Texas Supreme Court granted Richards' application for Writ of Error, reversed the judgment of the Court of Civil Appeals and remanded the case back to the Court of Civil Appeals for consideration of factual insufficiency points raised by Hughes. In reversing the Appellate Court, the Texas Supreme Court principally relied on *Thompson v. Monsanto Co.*, 559 S.W.2d 873 (Tex. App.—Houston [14th Dist.] 1977, no writ), distinguishing the instant case, because no final and binding decision was reached with regard to Richards' claim. Hughes then filed a Motion for Rehearing which was denied.

On remand from the Texas Supreme Court, the 14th Court of Civil Appeals reversed the trial court and remanded the case for trial. Hughes sought a rehearing which was again denied.

Hughes then sought application for Writ of Error in the Texas Supreme Court raising issues of Federal preemption of Art. 8307(c), and after consideration of same, along with Richards' response, the application was appropriately denied. So too was Hughes' Motion for Rehearing denied.

REASONS FOR DENYING THE PETITION

The decision rendered by the Court below was based on the lack of finality of the decision reached through the collective bargaining mechanism.

Respondent does not dispute the preeminence of Federal law in matters involving collective bargaining agreements and disputes and grievances arising thereunder. Respondent does, however, disagree with the interpretation and consequences that Petitioner has spooned into the Texas Supreme Court's decision of this matter. While Petitioner's assertions may have some merit, these assertions simply do not fall from the decision rendered herein and therefore are not applicable to the instant decision.

Petitioner has applied for this Writ based on a faulty interpretation of the Texas Supreme Court's decision. Specifically Petitioner urges that the Texas Supreme Court held that actual arbitration of the discharge grievance is the only circumstance under which the employee-grievant's Art. 8307(c) suit will be barred. While the

Court cites, *Spainhouer v. Western Electric Co.*, 592 S.W.2d 662 (Tex. Civ. App.—Beaumont 1979) reversed 615 S.W.2d 190 (Tex. 1981) wherein the grievant's claim was not submitted to arbitration and Spainhouer was allowed to come into Court, the controlling issue was that no final determination was ever reached in the grievance process thereby allowing Spainhouer to file and pursue his lawsuit based on wrongful discharge. While arbitration was the final and last step that could have been pursued in Spainhouer, the Court's decision was based on the fact that the grievance was not fully pursued and therefore no final determination was ever reached. Spainhouer did not turn on the failure to arbitrate per se, but turned on the element of finality or lack thereof. It was only incident that arbitration was the next step that would have resulted in a final determination. Failure to pursue the grievance procedure could likewise result in a final decision that no final settlement was ever reached. *Carnation v. Borner*, 610 S.W.2d 450 (Tex. 1980).

In light of the foregoing, Respondent urges that the Texas Supreme Court's decision does not affect the federal scheme in that this scheme likewise recognizes that where no final, binding determination is reached regarding a dispute, the grievant is allowed to come into Court. Federal policy specifically is espoused as *final* adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. Section 203(d) Labor Management Relations Act, 29 U.S.C. § 173(d) (1978). Respondent therefore urges that lack of finality

permits the grievant to pursue his grievance through other channels, specifically, he is allowed to come into Court. *Vaca v. Sipes,* 386 U.S. 171 (1967). Therefore, the decision reached in the case herein could not have the far reaching effects espoused by Petitioner, that is, an incentive to avoid arbitration, and overturning decisions reached through the grievance mechanism without any reference to the adequacy of the collective bargaining agent's representation of the grievant.

It is urged by Respondent that no artificial distinction is drawn between those grievances which are resolved through arbitration and those which are resolved short of arbitration as Petitioner would argue. On the contrary, since the Texas Supreme Court bases its decision on the element of finality, Federal labor policy is indeed fostered and not infringed upon.

When the case herein is viewed from the perspective of lack of finality, Respondent urges that Petitioner's asserted conflict among the Courts below loses its relevance. There is no conflict with federal labor policy when a grievant is allowed to come into Court when a decision reached by the grievance mechanism is not final. Thus the handling of claims arising out of discharges resulting from the pursuit of Worker's Compensation claims is only a fractional part of the issue involved herein and the ultimate issue is the lack of finality. As such, Petitioner's argument is an improper one and not within the parameters of this case.

CONCLUSION

This case was correctly decided by the lower Court. The assertions of Petitioner do not come within the confines of this case because the decision rendered by the Union lacked finality. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(713) 523-7423

CERTIFICATE OF SERVICE

I, do hereby certify that a true and correct copy of the foregoing instrument was mailed Certified Mail Return Receipt Requested to the Attorney of record for the Petitioner on this the _____ day of _____, 1982.

GORDON R. COOPER, II

Petitioner's Reply Brief

Office-Supreme Court, U.S.
FILED
MAY 20 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HUGHES TOOL COMPANY,

Petitioner,

v.

WILLIE D. RICHARDS,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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Bowne of Houston, Inc. Printed in U.S.A.

I

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Plaintiff, Willie D. Richards, who is the Respondent herein, and Defendant, Hughes Tool Company, who is the Petitioner herein. In accordance with Rule 28.1, Hughes Tool Company, Petitioner herein, represents to the Court that it has no parent companies, and except as hereinafter listed below, all subsidiaries and affiliates of Hughes Tool Company are wholly owned (100%).

1. Hughes Tool Company, C.A. (Venezuela)
2. Hughes WKM de Brazil Equipamentos Industriais LTDA (Brazil)
3. Alea Company, Limited (Nigeria)
4. APSCO (Asia) Pte. Limited (Singapore)
5. Associated Petroleum Supply (Hong Kong) Limited
6. Brown-Foraid Oil Tools, U.A.E. Ltd. (Bermuda)
7. Brown Oil Tools de France S. A. R. L. (France)

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No. 81-1838

IN THE

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HUGHES TOOL COMPANY,

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v.

WILLIE D. RICHARDS,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

In accordance with Rule 22.5 of the Rules of the Supreme Court of the United States, Petitioner, Hughes Tool Company ("Hughes") files this Reply to the Response to Petition for Writ of Certiorari to the Supreme Court of Texas, previously filed herein by Respondent, Willie D. Richards ("Richards").

ARGUMENT AND AUTHORITIES IN SUPPORT OF PETITIONER'S REPLY

Richards asserts that the decisions of the courts below are based upon a lack of finality in the grievance proceedings relating to his discharge from the employment of Hughes. In this regard, Hughes would respectfully submit that this assertion is plainly wrong.

First, when the decisions of the Texas Supreme Court in the instant case, *Richards* v. *Hughes Tool Company*, 615 S.W.2d 196 (Tex. 1981), and in *Spainhouer* v. *Western Elec. Co., Inc.*, 615 S.W.2d 190 (Tex. 1981), are considered with the decision of the Court of Appeals in *Thompson* v. *Monsanto Co.*, 559 S.W.2d 873 (Tex. Civ. App.-Houston [14th Dist.] 1977, no writ), a decision in which the holding therein has been at least implicitly approved by the Texas Supreme Court, one can only reasonably conclude that in Texas, a grievance determination reached short of arbitration and pursuant to a valid collective bargaining grievance procedure will not bar a subsequent action under Tex. Rev. Civ. Stat. Ann., art. 8307c (Supp. 1982), involving the same issues. To the extent the decision of the Texas Supreme Court herein is premised on a lack of finality, such a rule, if allowed to stand, is at odds with well settled and controlling federal principles; for an employee: (1) whose grievance is subject to resolution through the collective bargaining process, and, (2) who avails himself of the benefits of such process, does not have an absolute right to have his grievance arbitrated and is bound by the results thereof, absent, of course, proof that the employee's collective bargaining representative breached its duty of fair representation under § 8(b)(1) and (2) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1) and (2) (1978). *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *see also United Parcel Service,*

Inc. v. *Mitchell*, ____ U.S. ____, 101 S.Ct. 1559 (1981). As explained in its Petition for Writ of Certiorari, at no time has Richards ever complained that his union, United Steelworkers of America, Local 1742, failed in any respect to represent his interests in the grievance proceedings which took place prior to his discharge from the employment of Hughes. Hence, the fact that Richards' grievance was not processed up to and through arbitration is simply irrelevant. Rather, the critical inquiry is whether Richard's union, his exclusive bargaining representative, satisfied its fair representation duty under the National Labor Relations Act. Although given every opportunity to raise this issue Richards has declined to do so, and, more importantly, even had he raised the issue, the record below is absolutely barren of any evidence whatsoever to support such a finding.

Second, neither Richards nor his union appealed the adverse determination concerning his discharge. Pursuant to the collective bargaining contract between Hughes and Richards' union, a grievance determination is required to be appealed to the next level within a period of 10 days.[1] Only Richards and his union are privy to the reasons why the adverse grievance determination was not appealed; one uncontroverted fact is clear, however, and that fact is that no such appeal of the adverse grievance determination was ever taken. Therefore, by operation of contract and as matter of law, Richards' unappealed grievance constitutes a final and binding determination thereof, thus barring his subsequent art. 8307c action involving the same issues. Hence, Richards' assertion that his action under art. 8307c can be maintained because the underlying grievance was not carried to its ultimate conclusion (a circumstance over

[1] The collective bargaining agreement between Hughes and Richards' union is part of the record below. Def. Ex. 3. The applicable provisions of said agreement are set forth at Appendix 1 of this Reply.

which Hughes, pursuant to the collective bargaining agreement, has absolutely no control), and, therefore, is lacking in finality, is simply incorrect.

Finally, Hughes would respectfully submit that the instant case is wholly unlike that class of decisions wherein this Court has held that employees are not bound by the results obtained in the grievance and arbitration process, and may pursue supplemental or alternative remedies as may be provided by statute.[2] *See Barrentine* v. *Arkansas-Best Freight System,* 450 U.S. 728 (1981); *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36 (1974); *U.S. Bulk Carriers, Inc.* v. *Arguelles,* 400 U.S. 351 (1971); *Carey* v. *Westinghouse Electric Corporation,* 375 U.S. 261 (1964); *McKinney* v. *Missouri-Kansas-Texas R. Co.,* 357 U.S. 265 (1958). The aforecited decisions of this Court all possess one distinct characteristic which distinguishes them from the case at bar: that is, in each case the supplemental or alternative remedy which the employee was permitted to pursue was the result of an express, *federal* enactment and pursuant to an independent *federal* statutory scheme.[3] By contrast, in the instant case, the claim which Richards asserts under art. 8307c, is not a claim which arises as a result of express Congressional action; and thus it may not be considered as a claim or right the pursuit of which is not foreclosed by the result obtained in a

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[2] These statutory remedies are, of course, in addition to those remedies an aggrieved employee may pursue under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1978), provided, the employee can prove a breach of his union's duty of fair representation.

[3] Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1978) *(Barrentine)*; Title VII Civil Rights of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1981) *(Alexander)*; Merchant Seaman's Act, 46 U.S.C. §§ 541, 596 (1958) *(Arguelles)*; National Labor Relations Act, § 151 *et seq.* (1978) *(Carey)*; Universal Military Training and Service Act, 50 U.S.C. App. § 459 (1981) *(McKinney)*.

prior grievance proceeding. Rather, art. 8307c can be characterized as nothing more than a competing state remedy which must, under the circumstances of this case, yield to the preeminent federal enactment and policies emanating therefrom.

In section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d)(1978), Congress declared that the collective bargaining process is the preferred method of resolving disputes which are subject to a collective bargaining contract. If the decisions of the courts below are allowed to stand, this Congressionally preferred method will quickly become the discarded method, for employees, unions and employers alike will have no incentive to avail themselves of the collective bargaining process if they are permitted to circumvent such procedures at will, either under the guise of some intrusive state enactment such as art. 8307c, or under some recognized or emerging theory of state common law.

CONCLUSION

The issues presented by the instant case are significant and recurring issues, and have never been expressly addressed by this Court. Accordingly, for the foregoing reasons a writ of certiorari should issue to review the judgment, opinion and related rulings of the Supreme Court of Texas.

Respectfully submitted,

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Appendix

APPENDIX

CONTRACT

Between

The United Steelworkers

of America

AFL-CIO

and

The Hughes Tool Company

September 15, 1974

ARTICLE IX

Grievances

SECTION 1. The Union may select a chief grievance man for each shift and a grievance man for each department on each shift. If a department is located in two or more buildings, there may be an additional grievance man for the department. The grievance men shall, when excused by the foreman, be paid by the Company for all legitimate time spent by them during their normal working hours in investigation of grievances referred to them and in handling grievances with designated representatives of management.

SECTION 2. In addition to the foregoing, the Union may appoint a grievance committee, not to exceed five (5), to meet with designated management representatives, if necessary, and the members of such grievance committee shall be paid by the Company for all time spent by them during their normal working hours in investigating grievances and in handling grievances with designated management representatives. All grievance men and grievance committee members must secure approval of the appropriate foreman or department head before leaving one department and before entering another.

SECTION 3. A grievance may be first taken up by the employee involved with his foreman, supervisor, or the grievance man in the department where the grievance arose.

SECTION 4. The presentation of a grievance by an employee whether individually or through his grievance committeeman must be made to the appropriate supervisory employee involved not later than forty-five (45) days after the occurrence of the event which causes the individual or individuals to feel aggrieved.

SECTION 5. Should the grievance man, or the employee, and the foreman or supervisor be unable to adjust and

settle the grievance, then the grievance man may refer the grievance to the chief grievance man for the applicable shift, who in turn may take up the grievance with the general foreman or group manager. In the event the chief grievance man and the general foreman or group manager are unable to settle the grievance, the chief grievance man may then refer the grievance to the Union grievance committee, which may take up the grievance with the appropriate department head. In the event the Union grievance committee and the appropriate department head are unable to dispose of the grievance, the Union grievance committee may refer the grievance to the Staff Representative of the International Union who may then appeal the grievance to the Assistant to President for Industrial Relations, or his designated representative for a hearing.

SECTION 6. Grievances which are taken beyond the initial step in the grievance procedure must be reduced to writing. Likewise, the Company's answer to all grievances after the initial step must be given in writing. All Company representatves up to and including the general foreman or group manager, shall render a decision on the grievance within forty-eight (48) hours after the time it is submitted, exclusive of Saturdays, Sundays, and holidays. The answer of a department head on a grievance appeal from a decision of the general foreman or group manager must be rendered in writing within five (5) days (exclusive of Saturdays, Sundays, and holidays). The answer of the Assistant to President for Industrial Relations and/or his designated representative must be rendered in writing within five (5) days (exclusive of Saturdays, Sundays, and holidays) after completion of hearing of the case. A grievance may not be presented from one step to another unless an appeal from the last decision of the Company representative is made within ten (10) days, exclusive of Saturdays, Sundays, and holidays.

SECTION 7. In the event the Staff Representative of the International Union and the Assistant to President for Industrial Relations and/or his designated representative are unable satisfactorily to dispose of a grievance, then the Union may carry the grievance to arbitration by advising the Company in writing of a desire to arbitrate the question within ten (10) days of the last action of management on the grievance. Within five (5) days of the time the Union notifies the Company of a desire to arbitrate the question, the Union shall appoint an arbitrator and the Company shall appoint an arbitrator, and the two arbitrators so chosen shall select a third arbitrator. In the event the two arbitrators are unable to agree upon the third arbitrator, the third arbitrator shall be appointed by the United States Conciliation Service of the Department of Labor upon the request of either party. The decision of a majority of the arbitrators shall be final and binding upon the parties.

SECTION 8. The sole function of the arbitrators shall be to determine whether the Company or the Union is correct with reference to the proper application and interpretation of this agreement, and the arbitrators shall have no authority to change, amend, or modify this agreement in any respect whatsoever.

SECTION 9. The arbitrators shall render a decision in writing that shall be final and binding upon the parties. Such decision shall be rendered within sixty (60) days after receipt of the briefs of the parties.

SECTION 10. The Company and the Union shall each pay half the cost of the arbitration proceedings.

ARTICLE X

Discipline and Discharge

SECTION 1. Company agrees that no employee shall be disciplined or discharged except for just cause and that no employee will be unreasonably and unjustly discriminated against.

SECTION 2. In cases of discipline or discharge, the employee will be notified that he is entitled to Union representation, if he desires it.

SECTION 3. An employee shall not be peremptorily discharged. In cases in which management concludes that an employee's conduct may justify suspension or discharge, he shall be suspended initially for not more than five (5) working days. At the time of suspension, the supervisor shall call the departmental grievance man and give him the reason, but grievance will not be discussed or processed.

Within the five-day suspension period a meeting must be held with the supervisor, the group manager, the employee, the departmental and chief grievance men, and the chairman of the grievance committee for a full discussion of the action taken by the supervisor. At the conclusion of this meeting, management's decision will be given.

At such meeting the facts concerning the case shall be made available to both parties. At the conclusion of this meeting, management will determine if suspension will be affirmed, modified, revoked, extended, or converted into a discharge.

Within five (5) days of management's decision as to discipline or discharge, but not thereafter, a grievance may be filed directly with the department manager.

Such grievance shall thereupon be handled in accordance with the procedures of Article IX, Grievances.

SECTION 4. If the initial suspension is for a period not to exceed four (4) working days, the employee may file a grievance as proposed in Article IX.

Any employee who is disciplined may complain of same within five (5) working days of the date discipline begins but not thereafter. Such a complaint will be handled as any other grievance except that it will not be necessary for it to be first taken up with the supervisor.

The Company will give the Union prompt notice of any disciplinary layoff of any employee in the bargaining unit.

CERTIFICATE OF SERVICE

I, Kent W. Robinson, Attorney for Hughes Tool Company, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of May, 1982, I served three (3) copies of the foregoing Reply to Response to Petition for Writ of Certiorari to the Supreme Court of Texas, upon Mr. Gordon R. Cooper, Esq., Attorney for Respondent, Willie D. Richards, by mailing said copies in a duly addressed envelope, with first class postage prepaid to the business address of such Attorney for Respondent, which is 1834 Southmore, Houston, Texas, 77004 .

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